No. 87-1372

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ARGENTINE REPUBLIC,
Petitioner,

v.

AMERADA HESS SHIPPING CORPORATION
and
UNITED CARRIERS, INC.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND JUDICIAL CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* and BRIEF FOR THE REPUBLIC OF LIBERIA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

FRANK L. WISWALL, JR.,
Counsel for the Republic of Liberia
11870-D Sunrise Valley Drive
Reston, Virginia 22091-3303
(703) 620-6780

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1372

ARGENTINE REPUBLIC,
Petitioner,

—v.—

AMERADA HESS SHIPPING CORPORATION
and
UNITED CARRIERS, INC.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND JUDICIAL CIRCUIT

MOTION OF THE REPUBLIC OF LIBERIA FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

The Republic of Liberia hereby respectfully moves the Court for leave to file the within brief as *amicus curiae* in the matter captioned above. Counsel for Respondents Amerada Hess Shipping Corporation and United Carriers, Inc. have consented to the filing of the brief; Counsel for Petitioner Argentine Republic has not consented.

This case arises directly under the Constitutional grant of admiralty and maritime jurisdiction, including jurisdiction in prize and neutrality cases. Liberia is the neutral State in the present case, which puts before the Court certain important issues which it has not considered in more than 150 years.

The **HERCULES** was an unarmed merchant ship of Liberia, engaged in the domestic trade exclusively between ports of the United States at the time she was attacked by Petitioner's forces. Respondents, the time charterer and the owner of the **HERCULES**, are Liberian corporate nationals doing business in the United States.

The interests of the Republic of Liberia in the instant case are limited but important. They are (i) to ensure that the Treaty of Friendship, Commerce and Navigation between the United States and Liberia is justified, recognized and applied; and (ii) to support the principle that an unprovoked armed attack by a sovereign state upon a neutral merchant ship on the high seas is under the Law of Nations an act which avoids the natural immunity of the attacking sovereign and which requires absolutely the cooperation of neutral courts to ensure that compensation is made.

The Republic of Liberia wants nothing more than justice for its nationals; but of equal importance is the demand of the Law of Nations that the innocent victims of armed attack on the high seas shall have an effective remedy for their injuries.

Liberia is concerned that, because of the emphasis placed below upon the sovereignty of Petitioner, it may be assumed that any foreign sovereign would assume the position of absolute immunity advocated by Petitioner and by the United States as *amicus*. It is important to Liberia that it be given the opportunity as another sovereign—one whose neutrality has been outrageously violated—to make its argument to the Court that there are good and sufficient grounds for the absence of immunity in the present case.

It is for these reasons that the Republic of Liberia requests this Honorable Court to grant its motion for leave to file the following brief.

Respectfully submitted,

FRANK L. WISWALL, JR.,
Counsel for the
Republic of Liberia
11870-D Sunrise Valley Drive
Reston, Virginia 22091-3303
(703) 620-6780

Dated: August 25, 1988

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1372

ARGENTINE REPUBLIC,
Petitioner,
—v.—
AMERADA HESS SHIPPING CORPORATION
and
UNITED CARRIERS, INC.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND JUDICIAL CIRCUIT

BRIEF FOR THE REPUBLIC OF LIBERIA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Opinions Below

The opinion of the Second Circuit is reported at 830 F.2d 421, 1987 AMC 2705 (1987). The opinion of the District Court is reported at 638 F. Supp. 73 (S.D.N.Y. 1986). Both opinions are reproduced in the Appendix to the Petition for Certiorari (hereafter "P.A."), pp. 1a—35a.

The caption of the case in this Court contains the names of all the parties.

Constitutional Provisions Involved

U.S. CONST. Art. I, § 8, Cl. 10

The Congress shall have power . . .

To define and punish Piracies and Felonies committed on the high seas, and Offenses against the Law of Nations;

U.S. CONST. Art. III, § 2, Cl. 1

The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction;

Treaty Provisions Involved

TREATY OF FRIENDSHIP, COMMERCE
AND NAVIGATION
BETWEEN
THE UNITED STATES AND LIBERIA.
SIGNED AT MONROVIA, AUGUST 8, 1938
(54 STAT. 1739, T.S. NO. 956).

ARTICLE I

• • • • •

The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law.

The nationals of each High Contracting Party shall receive within the territories of the other, upon submitting to conditions imposed upon its nationals, the most constant protection and security for their persons and property, and shall enjoy in this respect that degree of protection that is required by international law. Their property shall not be taken without due process of law and without payment of just compensation.

• • • • •

• • • • •

ARTICLE XVII

Limited liability and other corporations and associations, whether or not for pecuniary profit, which have been or may hereafter be organized in accordance with and under the laws, National, State or Provincial, of either High Contracting Party and which maintain a central office within the territories thereof, shall have their juridical status recognized by the other High Contracting Party provided that they pursue no aims within its territories contrary to its laws. They shall enjoy free access to the courts of law and equity, on conforming to the laws regulating the matter, as well for the prosecution as for the defense of rights in all the degrees of jurisdiction established by law.

• • • • •

GENEVA CONVENTION ON THE HIGH SEAS, 1958
(13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82)

• • • • •

ARTICLE 23

• • • • •

7. Where a ship has been stopped or arrested on the high seas in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained.

• • • • •

Statutes

JUDICIARY ACT OF 1789
28 U.S.C.

§ 1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

• • • • •

§ 1350. Alien's action for tort

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

• • • • •

FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976
28 U.S.C.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

• • • • •

(5) . . . in which money damages are sought against a foreign state for . . . damage to or loss of property, occurring in the United States and caused

by the tortious act or omission of that foreign state . . .

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state:

• • • • •

• • • • •

Foreign Law Involved

LIBERIAN CODE OF LAWS REVISED
TITLE 5: ASSOCIATIONS LAW

PART I: BUSINESS CORPORATIONS
[The Liberian Business Corporation Act of 1976]

CHAPTER 2. CORPORATE PURPOSES AND POWERS

• • • • •

§ 2.5 Effect of incorporation; corporation as proper party to action.

A corporation is a legal entity, considered in law as a fictional person distinct from its shareholders or members, and with separate rights and liabilities. The corporation is a proper plaintiff in a suit to assert a legal right of the corporation and a proper defendant in a suit to assert a legal right against the corporation; . . . .

• • • • •

LIBERIAN CODE OF LAWS OF 1956
TITLE 22: MARITIME LAW
[The Liberian Maritime Law]

CHAPTER 1. CONSTRUCTION

SECTION 30

Adoption of American General Maritime Law.—Insofar as it does not conflict with any other provisions of this Title, the non-statutory General Maritime Law of the United States of America is hereby declared to be and is hereby adopted as the General Maritime Law of the Republic of Liberia.

* * * * *

Statement of the Case

The Liberian tank vessel **HERCULES** (Official Number of Registry 3763) of 216,641 DWT, owned by Respondent United Carriers, Inc. and time-chartered to Respondent Amerada Hess Shipping Corporation, had for several years prior to her loss been engaged exclusively in the United States domestic port-to-port trade, carrying crude oil in interstate commerce from the port of Valdez, Alaska, south around Cape Horn and north to a refinery at the port of St. Croix, U.S. Virgin Islands, bunkering there and returning in ballast along the same route to Valdez. Both Respondents are and were at all times Liberian corporate nationals in good standing.

On May 25, 1982, the **HERCULES** departed St. Croix in ballast and fully bunkered for the round trip to Valdez. At this time the Falklands/Malvinas War was in progress in the South Atlantic, a conflict in which Liberia was at all times a strictly neutral nation. Agencies of the U.S. Government and the **HERCULES** herself (by radio) kept Argentine government agencies informed of her identity, her voyage and her position.

On June 8, 1982, on the high seas and without warning, Argentine government air forces made three separate bombing sorties against the **HERCULES** between 1350 and 1625 G.M.T., damaging her severely and leaving an undetonated bomb lodged tightly in the upper internal members of the No.2 port wing cargo tank. After survey and expert advice it was considered a practical impossibility to safely remove the bomb, and Respondent United Carriers was forced to scuttle the vessel more than a mile deep in open sea. As a result of this unprovoked attack upon an unarmed neutral merchant ship, Respondent owner United Carriers, Inc. lost a vessel worth $10,000,000.00 and her charter, and Respondent charterer Amerada Hess Shipping Corporation lost bunkers worth $1,901,257.07 together with the future use of the **HERCULES.**

After the attack upon the **HERCULES,** *amicus* sought clarification of the incident from Petitioner through diplomatic channels; no satisfactory response was ever received, and Petitioner has refused even to discuss the necessary compensation of Respondents.

Summary of Argument

I. The Treaty of Friendship, Commerce and Navigation ("FCN Treaty") between the United States and Liberia entitles the Respondents, both Liberian corporate nationals, a right of access to the Courts of the United States upon an equal footing with U.S. citizens. Because the present case involves a matter of neutrality, arising directly under the Constitution's grant of maritime jurisdiction in Article III, § 2, Cl. 1, the Courts of the United States become by virtue of the FCN Treaty the courts of a neutral state for adjudication of Respondents' rights under maritime international law.

II. Customary maritime international law, which is equally binding upon the United States, Argentina and Liberia, requires that the attacking state compensate the loss of a neutral ship unjustifiably attacked on the high seas. While the present case presents certain of these issues to the Court for the first time in over a century and a half, there is ample precedent in the late 18th and early 19th century decisions

of the Court. The attack which led to the destruction of the **HERCULES** was not only a violation of international law, but was a maritime tort, and application of the Alien Tort Statute, 28 U.S.C. § 1350, is consistent with the requirements of maritime international law that full compensation be paid to Respondents for their actual loss and damage.

III(a). The Alien Tort Statute, 28 U.S.C. § 1350, carries into law the power granted by the Constitution in Article I, § 8, Cl. 10 to "define . . . Offenses against the Law of Nations." The FCN Treaty requires that Respondents receive within the United States "that degree of protection that is required by international law" for their property capable of protection by the United States, which must include their property rights as neutrals where an offense against the law of nations has been committed. The Alien Tort Statute, in this respect, merely exercises the Constitutional authority of Congress in a case arising under the Constitutional grant of maritime jurisdiction to the Courts of the United States.

(b). The finding of the District Court that no loss whatsoever occurred in the United States was clearly erroneous, as the undisputed facts show that both Respondents suffered substantial losses within the United States which were a direct consequence of the attack by Petitioner upon the **HERCULES.** The District Court could, therefore, have utilized the tort exception of the Foreign Sovereign Immunities Act ("F.S.I.A."), but instead held that the F.S.I.A. completely bars Respondents from obtaining relief. Both Petitioner and the United States as its supporting *amicus* likewise contend that the F.S.I.A. is absolutely controlling with regard to any action whatsoever against a foreign sovereign in the Courts of the United States. That argument blinks at two fundamental obstacles: (1) that Congress clearly indicated in 28 U.S.C. § 1602 its intention that the F.S.I.A. apply in cases involving the "commercial activities" of foreign states, whereas this case involves the public governmental activity of a foreign state resulting in a deliberate and tortious violation of maritime international law; and (2) that because this case arises directly under the Constitutional grant of admiralty and maritime jurisdiction, the logical conclusion

of the argument advanced by Petitioner and the United States is that the F.S.I.A. may not merely regulate the application but may actually bar the exercise of jurisdiction granted to the courts by the Constitution. The Court has, in any case, long held that no Act of Congress should be so construed as to violate neutral rights, and the decision of the District Court did indeed ignore those rights—not least by failing to apply the F.S.I.A.'s tort exception in 28 U.S.C. § 1605(a)(5). That approach would also have minimized the applicability of the present case to other cases involving the loss of maritime property by torts committed outside the jurisdiction of the United States.

IV. It is proper for the Court to bear in mind, when deciding the disposition of this case, that a reinstatement of the decision of the District Court would leave Respondents without recourse to justice in any forum, and that result would be contrary to a fundamental characteristic of the admiralty jurisdiction. It would, however, be expected that the District Court consider the issue of *forum non conveniens* on remand.

ARGUMENT

I. The Treaty of Friendship, Commerce and Navigation Between the United States and Liberia Guarantees to the Respondents Standing Equal to That of Citizens of the United States.

The Treaty of Friendship, Commerce and Navigation of 1938 between the United States and Liberia, 54 Stat. 1739, T.S. No. 956, guarantees generally in Article I (*supra*, p. 4) a "freedom of access to the courts of justice" by Liberian nationals seeking redress in the United States.[1]

[1] By Article XVII of the FCN Treaty (*supra* p. 5), this right is made more specific with regard to Liberian corporations doing business in the United States, to wit: "They shall enjoy free access to the courts of law and equity, on conforming to the laws regulating the matter, as well as for the prosecution as for the defense of rights in all the degrees of jurisdiction established by law."

The District Court recognized the juridical status of Respondents, accepting as fact that they are Liberian corporations (P.A. 26a). Of course, both Respondents have the capacity to sue and be sued. See § 2.5 of the Liberian Business Corporation Act, *supra*, p. 7.

The law of the United States with regard to standing to sue under such clauses as those in the present FCN Treaty was well declared in *The Nordic Regent*, 654 F.2d 147, 1980 AMC 309 (2d Cir. 1978), cert. den. 449 U.S. 890 (1980), where in writing for a majority of the entire Circuit bench and commenting upon *Farmanfarmaian v. Gulf Oil Corp.*, 588 F.2d 880 (2d Cir. 1978), Judge Timbers noted that, with regard to the standard FCN Treaty phrase "access to the courts', "Such access would have little value if the door that admits is a revolving one." 654 F.2d at 153, 1980 AMC at 318, n. 6.

Such right of access is, of course, independent of the grounds upon which relief is sought, and Respondents must bring a cognizable cause of action against a suable defendant; but the underlying principle for application to cases such as the present was settled long ago:

> The courts of the captor are still open for redress. The injured neutral, it is to be presumed, will there receive indemnity for a wanton or illicit capture; and if justice be refused him, his own nation is bound to vindicate or indemnify him.
>
> • • • • •
>
> The material questions necessary to be considered, in order to dissipate these doubts, are, lst. Does this principle properly furnish a plea to the jurisdiction of the admiralty courts? 2d. If not, then does not jurisdiction over the subject-matter draw after it every incidental or resulting question relative to the disposal of the proceeds of the *res subjecta*?
>
> The first of these questions was the only one settled in the case of *Glass v. The Betsey*, [3 U.S. (3 Dall.) 6 (1794)], and the case was sent back with a

> view that the district court should exercise jurisdiction, subject, however, to the law of nations on this subject as the rule to govern its decision.
>
> And this is certainly the correct course. Every violent dispossession of property on the ocean is, *prima facie*, a maritime tort; as such, it belongs to the admiralty jurisdiction.

L'Invincible, 14 U.S. (1 Wheat.) 238, 256-57 (1816).

The phrase above used by Justice Johnson—"... if justice be refused him, his own nation is bound to vindicate or indemnify him"—certainly refers to vindication or indemnity through recourse to the courts of the offended neutral state. But as the early cases show, the neutral admiralty court of the United States was always open to aliens for vindication and indemnity where their neutral rights had been violated, even when that violation was committed by a foreign sovereign's armed vessel. See *infra*, pp. 22-24. By virtue of the FCN Treaty an admiralty court of the United States becomes for these Liberian nationals the appropriate court of a neutral state. As put by Justice Story, "We see no difficulty in supporting the jurisdiction as concurrent in both [belligerent and neutral] nations. But, if there be any choice, it seems more properly to belong to the country of the injured than of the offending party." *The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 57 (1826).

Liberia has adopted, by statutory reference, the entire body of the non-statutory general maritime law of the United States; see Section 30 of the Liberian Maritime Law, *supra*, p. 8 Thereby the decisions of this Court in all cases of prize and neutrality have become the law of Liberia. The interests of aliens as well as Liberians were considered in choosing to follow the American law, as explained in one respect by the Supreme Court of Liberia nearly a century ago:

> In admiralty the court is bound to determine the cases submitted to its cognizance, upon equitable principles and according to the rules of natural justice. The grand object of doing justice between

the parties is superior to technical forms and rules, and where the strictest practice of the English common law or the civil law would turn a party out of court, or defeat or pervert justice, by considering an arbitrary rule of proceedings as paramount to all other considerations, the American admiralty finds in the educated reason and cultivated discretion of the court the means of defeating chicanery, rectifying mistakes, supplying deficiencies and suggesting to the party the means of reconstructing his case, if necessary, without the loss of such progress as he may have already made. (Ben. Adml. p. 218, sec. 358). *In admiralty, interests of great moment are involved to the nation, whether in respect to its own citizens, or to aliens. It upholds the nation's majesty and credit; largely, it effects its revenue, which is its lifeblood, that which enables it to exist and to maintain its independence, to develop its growth, and to afford it the means of support and protection to its citizens;* therefore the law will not allow justice to be defeated through technicalities, or mere form, or slight nonessential omissions.

Dennis v. Liberia, 1 Liberian L.R. 323, 327-28 (1898) (emphasis added).

Since under Liberian maritime law a Liberian national has the right to maintain suit against a wrongful attacker in the courts of Liberia for indemnity in a case of violent dispossession of property on the ocean, then under the FCN treaty an American national with the same claim may also maintain such a suit in the Courts of Liberia. And the reverse must also apply in the present case of maritime tort committed in violation of the law of nations. As Liberian corporate nationals doing business in the United States, Respondents need not resort to the courts of Liberia when the courts of the United States are competent to grant relief to an American citizen. Amerada Hess Shipping Corporation and United Carriers, Inc. stand before an admiralty court of the United States in the shoes of American citizens for purposes of asserting their claims.

The basic question therefore becomes that of jurisdiction over Petitioner, the Argentine Republic.

II. Application of the Alien Tort Statute to the instant case is consistent with maritime international law.

Wrongs done to a ship on the high seas lie within the ancient admiralty jurisdiction.[2] The entire crux of this case then is that the attack upon the **HERCULES** was committed by a foreign sovereign.

Both the customary international law of the sea (by which the United States, Argentina and Liberia are equally bound), and the expression of the rule in conventional international law (contained in Article 23 of the 1958 Geneva Convention on the High Seas, *supra*, p. 5, to which the United States is a Party), commit the nations of the world to ensure that when a neutral ship is unjustifiably attacked by a coastal State on the high seas, **"it shall be compensated"** by the attacking State for the loss thereby sustained.[3]

Amicus submits that the best guidance to be had in the present case is found in the late eighteenth and early nineteenth century decisions of the Court, during the long era of naval strife which began with the Revolution. It is to be admitted at the outset that no case on precisely all fours with the **HERCULES** has been found. There are, however,

---

[2] "That the Court has jurisdiction over the matters in question I cannot doubt. A suit in respect of injurious acts done upon the high seas was within the undisputed jurisdiction of the Court of Admiralty, as appears upon reference to Comyn's Digest (Comyn's Digest Tit. Admiralty, E. 7), and to Blackstone's Commentaries (Blackstone's Commentaries Book III., Cap. 7/S.3)..." *The Tubantia*, [1924] P. 78, 18 Ll.L.R. 158, 159 (P.D.A.D., 1924), per Sir Henry Duke (Lord Merrivale), P. And see BROWNE, *Compendious View of the Civil Law and the Law of the Admiralty*, vol. 2, p. 110 (2nd ed.) London, 1802; cited in *Jennings v. Carson*, 8 U.S. (4 Cranch) 2, 23 (1807).

[3] Scholarly opinion is unanimous to the effect that Article 23 of the 1958 Convention on the High Seas and its counterpart provision in Article 111 of the 1982 United Nations Convention on the Law of the Sea are simply a codification of the long-established customary international law. See, e.g., O'CONNELL, *The International Law of the Sea*, vol. II, pp. 1078, 1084, Oxford, 1984.

a number of cases offering useful parallels; and if there is no *recent* authority to draw upon in respect of certain crucial points, that owes very simply to the fact that this is the first case in over a century and a half to present these issues to the Court.

In order to uphold the Law of Nations, and in particular the public order of the high seas, it has long been held essential for neutral maritime courts to assist in recovery of the compensation which international law particularly demands for such flagrant violations of the right of neutrals to freedom of navigation. As expressed by Justice Story in *The Amiable Nancy:*

> The jurisdiction of the district court to entertain this suit [for marine trespass] *by virtue of its general admiralty and maritime jurisdiction,* and independent of the special provisions of the Prize Act . . . has been so repeatedly decided by this court, that it cannot be permitted again to be judicially brought into doubt. Upon the facts disclosed in the evidence, this must be pronounced a case of gross and wanton outrage, without any just provocation or excuse.

16 U.S. (3 Wheat.) 546, 558 (1818) (emphasis added).

Neutral courts are bound to do more than simply condemn such actions as those of Petitioner in mounting the prolonged attack on the **HERCULES** and then refusing to entertain any claim for the losses sustained; and the Judiciary Act of the United States offers a means for effective redress for such tort when "committed in violation of the law of nations . . . ." 28 U.S.C. § 1350.

There exists a category of tortious violations of the Law of Nations so grave that Congress *must not* be presumed, in the absence of specific reference, to have abolished jurisdiction over them in enacting the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602, *et seq.* See *infra,* pp. 21, 23-24. It is difficult to imagine a tort more fitting to be a subject of the Alien Tort Statute, 28 U.S.C. § 1350, than repeated

attack upon a clearly-identified neutral and unarmed merchant ship on the high seas, nor a case more certainly meeting the absolute requirement of international law for compensation. As again put by Justice Story:

> Whatever may be the case, where a gross, fraudulent, and unprovoked attack is made by one vessel upon another upon the sea, which is attended with grievous loss or injury, such effects are not to be attributed to lighter faults or common negligence. It may be just, in such cases, to award to the injured party full compensation for his actual loss and damage; . . . .

The Marianna Flora, 24 U.S. (11 Wheat.) 1, 40 (1826).

III. Petitioner enjoys no immunity from suit in this matter.

(a) The Alien Tort Statute

Respondents have invoked the Alien Tort Statute, 28 U.S.C. § 1350: "The district courts shall have original jurisdiction of **any civil action** by an alien for a tort only, committed **in violation of the law of nations** or a treaty of the United States." (Emphasis added.) The U.S.-Liberia FCN Treaty provides that: "The nationals of each High Contracting Party shall receive within the territories of the other, upon submitting to conditions imposed upon its nationals, the most constant protection and security for their persons and property, and shall enjoy in this respect **that degree of protection that is required by international law."** (Article I, *supra,* p. 4; emphasis added.)[4]

The significance of these plain words to *amicus* is that "**any** civil action" grants jurisdiction notwithstanding the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602

[4] This clause (and the FCN Treaty as a whole), is self-executing without reference to statute. "It stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself, without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts." *Asakura v. Seattle,* 265 U.S. 332, 340, 342 (1924). See also *Tucker v. Alexandroff,* 183 U.S. 424, 437 (1901).

et seq., where the tort committed is "in violation of the law of nations." As the United States maintains (Brief, pp. 13-14, 15), the word "*any*" is particularly significant and the plain meaning of the statute decides the issue. Indeed it is plain that the Alien Tort Statute was intended in 1789 to be the instrument of the Constitution, carrying into law the power granted to Congress "To define and punish Piracies and Felonies upon the high Seas, and Offenses against the Law of Nations." U.S. CONST. Art. I, § 8, Cl. 10. It cannot be coincidence that "violation of the law of nations" is one of the two grounds upon which the Alien Tort Statute, enacted in the year following adoption of the Constitution, may be invoked. As to contemporary interpretations, the sole commentary upon this Constitutional clause in *The Federalist* (by Madison, in *No. 42*) speaks only of the lack of provision in the Articles of Confederation for "the case of offenses against the law of nations," and the discussion which follows treats the power to "define" as quite separate and distinct from the power to "punish." The Alien Tort Statute is a clear exercise of the power of Congress to "define . . . Offences against the Law of Nations," for the purpose of allowing civil recovery for any tort so defined.

The Alien Tort Statute does not require that the tort be committed within the United States, nor does the FCN Treaty require that the property which is the subject of protection be located within the United States. What the FCN Treaty does require (Article I, p. 4 *supra*) is that **Respondents receive** within the United States "that degree of protection that is required by international law" for their property capable of protection by the United States, which must certainly include the rights of Respondents in and to their property. It is the gross violation of international law which resulted in the destruction of Respondents' neutral property that is at issue, and Respondents have brought their claims within the United States upon their rights to their destroyed property.

These alien Respondents seek the protection of their property rights in an unarmed neutral merchant ship in the Courts of the United States, alleging deprivation of that property by a maritime tort committed in violation of the

law of nations. The law of the United States, under the Constitutional grant of admiralty and maritime jurisdiction (*infra*, n.5) and as expressed in the Alien Tort Statute and the FCN Treaty, entitles Respondents to their day in the District Court of the United States.

(b) The Foreign Sovereign Immunities Act

The District Court took the F.S.I.A. as controlling in this matter, and granted Petitioner's motion to dismiss on grounds that Respondents had made out none of the exceptions to immunity in 28 U.S.C. §§ 1605-1607. The District Court found as a fact that "these Liberian plaintiffs . . . can claim no loss whatsoever occurring in the United States." 638 F. Supp. at 75. But in the same paragraph the District Court noted that "breathtakingly" broad interpretation has been given to language similar to that contained in § 1605(a)(5) in deciding the issue of jurisdiction. (P.A. 30a.)

There are reliable principles to be drawn from the prize and neutrality cases with respect to the present case. The prize jurisdiction is a part of the admiralty and maritime jurisdiction arising under U.S. CONST. Art. III, § 2. Cl. 1; and the Court held in *Jennings v. Carson*, 8 U.S. (4 Cranch) 2, 24 (1807), that the delegation of admiralty jurisdiction to the federal courts carries with it the prize jurisdiction without need for specific mention. See also *The Amiable Nancy*, *supra*, p. 16.[5] Prize and capture is not a subject of criminal

[5] The understanding that prize and neutrality are part and parcel of the admiralty jurisdiction well antedates the Constitution. As noted in *Benedict on Admiralty*, vol. 1 (Jurisdiction), §101, p. 7-3, n. 9 (E. Jhirad et al. 7th ed. rev., New York, 1985) in Rhode Island under the Confederation the "Maritime Court for the Trial of Prize Causes" was reconstituted in 1780 as a Court of Admiralty to exercise jurisdiction in respect of "causes concerning . . . all other matters and things of a Maritime Nature . . . ." Justice Story in his *Commentaries on the Constitution*, speaking of the grant in Art. III, § 2, Cl. 1, says that "The word "maritime" was, doubtless, added to guard against any narrow interpretation of the preceding word, "admiralty'." Sec. 1666, at p. 466 (5th ed. 1891). In this comment Story was encapsulating the definitive exposition of the admiralty jurisdiction, given eighteen years earlier in his judgment in *DeLovio v. Boit*, 7 F. Cas. 418 (No. 3776) (C.C. Mass. 1815):

> But whatever may in England be the binding authority of the

law but of maritime international law, yet it does not touch the "commercial activities" which are almost exclusively the subject of the F.S.I.A. as declared in 28 U.S.C. §1602. Petitioner and the United States as its supporting *amicus* argue that the *only* exceptions to immunity must be connected to commercial activities[6] unless, under the tort exception in

> common law decisions upon this subject, in the United States we are at liberty to re-examine the doctrines, and to construe the jurisdiction of the admiralty upon enlarged and liberal principles. The constitution has delegated to the judicial power of the United States cognizance "of all cases of admiralty and maritime jurisdiction;"
>
> • • • • •
>
> What is the true interpretation of the clause "all cases of admiralty and maritime jurisdiction?" If we examine the etymology, or received use, of the words "admiralty" and "maritime jurisdiction," we shall find, that they include jurisdiction of all things done upon and relating to the sea, or, in other words, all transactions and proceedings relative to commerce and navigation, and to damages or injuries upon the sea.
>
> *Id.* at 441.
>
> • • • • •
>
> The clause however of the constitution not only confers admiralty jurisdiction, but the word "maritime" is superadded, seemingly *ex industria*, to remove every latent doubt. "Cases of maritime jurisdiction" must include all maritime contracts, torts and injuries, which are in the understanding of the common law, as well as of the admiralty, *"Causae civiles et maritimae."* In this view there is a peculiar propriety in the incorporation of the term "maritime" in the constitution. The disputes and discussions, respecting what the admiralty jurisdiction was, could not but be well known to the framers of that instrument. *Montgomery v. Henry*, 1 Dall. [1 U.S.] 149 [(1790)]; *Talbot v. Commanders and Owners of Three Brigs*, *Id.* 95. One party sought to limit it by locality; another by the subject matter. It was wise, therefore, to dissipate all question by giving cognizance of all "cases of maritime jurisdiction," or, what is precisely equivalent, of all maritime cases. Upon any other construction, the word "maritime" would be mere tautology; but in this sense it has a peculiar and appropriate force.
>
> *Id.* at 442-43.

[6] Even compensation for expropriation in violation of international law, cited by the United States for the proposition that Congress comprehended such violation within the F.S.I.A. (Brief, pp. 23-24), is tied firmly to the commercial activity requirement by 28 U.S.C. § 1605(a)(3).

§1605(a)(5), the actual physical act causing damage to or loss of property occurs within the United States.

Now the question must be posed: 'What mischief does this interpretation advocated by Petitioner and the United States work in the case of a neutral merchant vessel of the United States taken forcibly on the high seas by a foreign sovereign in violation of the law of nations, which then flies the flag of and is operated by that capturing sovereign as its own commercial state-owned vessel, and which later comes within the jurisdiction of the neutral courts of the United States where she and her captor are proceeded against by her rightful American owners?' Will the United States, in support of Petitioner, argue that the F.S.I.A. has divested American citizens of their historic neutral rights under the Constitutional grant of jurisdiction in maritime and prize law? Will it say that this was the intent of Congress? Or must it concede that there is, after all, no application of the F.S.I.A. to cases such as *The Estrella*, 17 U.S. (4 Wheat.) 298 (1819), which arise directly under the Constitutional jurisdiction and are clearly analogous in principle to the present case? There it was declared by Justice Livingston that

> A neutral nation, which knows its duty, will not interfere between belligerents, so as to obstruct them in the exercise of their undoubted right to judge, through the medium of their own courts, of the validity of every capture made under their respective commissions, and to *decide on every question of prize law* which may 'arise' in the progress of such discussion. But it is no departure from this obligation, if, in a case in which a captured vessel be brought or voluntarily comes, *infra praesidia*, the neutral nation extends its examination so far as to ascertain whether a trespass has been committed on its own neutrality by the vessel which has made the capture. So long as a nation does not interfere in the war, but professes an exact impartiality toward both parties, it is its duty, as well as right, and its safety, good faith, and honor demand of it, to be vigilant in preventing its neutral-

> ity from being abused, for the purposes of hostility against either of them. This may be done, not only by guarding, in the first instance, as far as it can, against all warlike preparations and equipments in its own waters, but, also, by restoring to the original owner such property as has been wrested from him . . .

17 U.S. (4 Wheat.) 298, 308-09 (emphasis added).

And it is proper in such cases for a neutral court to call into question the public non-commercial actions of the attacking foreign sovereign:

> That the mere fact of seizure as prize does not, of itself, oust the neutral admiralty court of its jurisdiction, is evident from this fact, that there are acknowledged cases in which the courts of a neutral may interfere to devest possessions; to wit: those in which her own right to stand neutral is invaded; and there is no case in which the court of a neutral may not claim the right of determining whether the capturing vessel be, in fact, the commissioned cruiser of a belligerent power. Without the exercise of jurisdiction thus far, in all cases, the power of the admiralty would be inadequate to afford protection from piratical capture.

L'Invincible, 14 U.S. (1 Wheat.) 238, 258 (1816).

The precedents of the prize and neutrality cases, and those such as *The Amiable Nancy*, (*supra*, p. 16), which sound in prize but arise squarely under the Constitutional grant of maritime jurisdiction, are impossible to ignore in considering the present case.[7] If the interpretation of Petitioner and the

[7] The case of *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812), relied upon heavily by the United States (Brief, pp. 3, 20, 16), is simply inapposite to the present case. That case is also distinguished from all others cited herein by the first sentence of Chief Justice Marshall's opinion:

> This case involves the very delicate and important inquiry, whether an American citizen can assert, in an American court, a title to an *armed national vessel*, found within the waters of the United States.

Id. at 135 (emphasis added).

As Justice Story pointed out in the decision of the Court in *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283 (1822), the principle laid down in *The Schooner Exchange* involved an entirely different doctrine of maritime international law, *viz.*, the immunity of warships in neutral ports—a doctrine separate and apart from a sovereign's responsibility for violations of the law of nations:

> In the case of *The Exchange*, 7 Cranch, 116, the grounds of the exemption of public ships were fully discussed and expounded. It was there shown that it was not founded upon any notion that a foreign sovereign had an absolute right, in virtue of his sovereignty, to an exemption of his property from the local jurisdiction of another sovereign, when it came within his territory; for that would be to give him sovereign power eyond the limits of his own empire. But it stands upon principles of public comity and convenience, and arises from the presumed consent or license of nations, that *foreign public ships coming into their ports, and demeaning themselves according to law, and in a friendly manner, shall be exempt from the local jurisdiction.* But as such consent and license is implied only from the general usage of nations, it may be withdrawn upon notice at any time, without just offense, and if afterwards such public ships come into our ports, they are amenable to our laws in the same manner as other vessels.

Id. at 352-53 (emphasis supplied).

In the present day, the old term "public ships" has become "ships owned or operated by a State and used only on government non-commercial service". See United Nations Convention on the Law of the Sea, 1982, Art. 96. But the public ship described by Chief Justice Marshall in *The Schooner Exchange* was also "an armed national vessel" and was categorized in that decision with "ships of war" (20 U.S. 135, 141, 146). The doctrine of immunity of warships in neutral ports is entirely separate and distinct from the maritime jurisdiction over sovereign commercial property in prize and neutrality cases. See *The Santissima Trinidad*, *supra*, and O'CONNELL, *supra* n. 3, vol. II at pp. 1106-08.

United States is accepted, then the Constitutional grant of neutral jurisdiction to the courts of United States in prize cases, is overridden by the F.S.I.A.; but if the language "damage to or loss of property, occurring in the United States" is seen to include damage which is caused by an *act* which physically takes place outside the United States, then American citizens may, as heretofore, vindicate those neutral

property rights which they have always enjoyed under Article III, § 2, Cl. 1—and which Congress never appears to have intended to exclude in debating, fashioning and enacting the F.S.I.A. Those rights enjoyed for 200 years by American citizens to proceed against a foreign sovereign for restoration or compensation for the loss of a captured neutral merchant vessel, not arising out of the commercial activity—but out of the *military activity*—of that attacking foreign sovereign, are the same rights as those of Respondents in this case.

A better illustration of the vindication of these Constitutional rights could hardly be desired than that of *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 293 (1822). There a foreign neutral cargo seized by a warship on the high seas and later brought by that warship into the United States was libeled in the United States District Court by the neutral States. Despite the seizing sovereign's possession of the cargo, the Court decreed restitution. The Reporter of the Court, Dr. Henry Wheaton, himself an eminent international lawyer and author of the great and enduring *Elements of International Law*, summarized with particular care the arguments of counsel. On behalf of the neutral claimant one of the foremost advocates of the Bar in that day, Littleton W. Tazewell of Virginia, put the case as follows:

> It is only important then to examine the question, whether the information of the sovereign or executive government be the proper and only standard to which the court must refer, in matters wherein not our own people, but foreign states are concerned. Whatever the theory may be on this subject, all know that, in point of fact, courts of justice do and must decide upon the right of sovereigns, and that even in governments the most absolute. For these courts must necessarily decide upon the rights of private individuals and corporations, and these are oft-times so interwoven with the rights of their sovereigns, that to decide upon the one, is to decide upon the other, not only in form, but effect also.

20 U.S. (7 Wheat.) at 302-03.

The Republic of Liberia's rights in the present case are interwoven with those of Respondents, as were the rights of the Empire of Spain with its nationals in *The Santissima Trinidad*.[8]

Amicus argues that the interpretation of 28 U.S.C. § 1605(a)(5) which should be adopted is that which does *not* oust the rights arising under a historic Constitutional jurisdiction in admiralty. This concern was specifically referred to in the section-by-section analysis of the proposed F.S.I.A. in 1973, which declared that it was not intended to supplant the specialized jurisdictional regimes of maritime and prize law. 1973 *Hearing* 47; 119 Cong. Rec. 2219 (1973). The United States argues (Brief, p. 17, n. 13) that this analysis should be disregarded because the exceptions in § 1605(b) were later added. The problem with accepting that argument is that § 1605(b) deals with only one part of admiralty jurisdiction, restricted again to "commercial activity of the foreign state," and does not mention the specialized admiralty and maritime jurisdiction as a neutral in non-commercial activity tort cases, let alone the jurisdiction in prize, capture and neutrality cases, all arising directly under the Constitution and as historically rooted in maritime international law.

Not only belligerents, but also neutrals have rights arising out of conflicts such as the Falklands/Malvinas War; and the Court in construing statutes of the United States has declared a special obligation to uphold such neutrals' rights and to promote neutral commerce, *viz.*:

> . . . *an act of congress* ought never to be construed to violate the law of nations if any other possible construction remains, and, consequently, *can never be construed to violate neutral rights*, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.

---

[8] Indeed, if it were not for the FCN Treaty, Liberia's position would be that of a party rather than *amicus*. See *The Bello Corrunes*, 19 U.S. (6 Wheat.) 153, 168 (1821).

> These principles are believed to be correct, and they ought to be kept in view in construing the act now under consideration.

Marshall, C.J., in *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (emphasis added).

The record before this Honorable Court shows by clear and uncontradicted evidence that both Respondents, as neutral nationals, did indeed suffer losses of property within the United States. The District Court accepted as fact that the **HERCULES** was engaged under time charter in a routine trade between two ports of the United States. 638 F. Supp. at 73. The **HERCULES** was carrying out this domestic U.S. port-to-port trade under Articles VII and XVI of the FCN Treaty.

Respondent United Carriers, Inc., owner of the **HERCULES**, suffered the loss of its vessel while she was employed in the U.S. domestic trade, and *amicus* submits that this is properly regarded as the loss of a property right occurring in the United States. Even more directly, the owner suffered loss of the U.S. charter hire, payable in U.S. dollars in the United States. This appears from Plaintiffs' Exhibit 1(A), the charterparty, (J.A.-41), which the District Court was bound to accept as proven fact for purposes of ruling upon the Motion to Dismiss, but which was simply ignored by that Court.

As to Respondent Amerada Hess Shipping Corporation, their loss was not only the value of the bunkers aboard the vessel, which were sold and delivered within the United States, but also the frustration of the charterparty, which caused them to lose their right to the use of the vessel in the exclusive U.S. domestic trade.

Amicus does not see how it is possible to characterize these losses otherwise than as occurring—at least in substantial part—within the United States, and submits that the decision of the District Court was clearly erroneous in finding that "no loss whatsoever" occurred in the United States. *McAllister v. United States*, 348 U.S. 19 (1954). Both the loss

to her owner of future earnings from the **HERCULES** and the loss to her charterer of future use of the vessel, while not quantified as separate elements of the damages, are losses from the same operative cause and are sufficient to vest jurisdiction under the F.S.I.A., 28 U.S.C. § 1605(a)(5).

Amicus, as a foreign sovereign, agrees that the Court should properly be concerned that the District Courts of the United States not sit unrestrained as 'little international courts of claims.' But a *limited* exercise of that function is precisely what is contemplated by the F.S.I.A.; and the peculiarly restrictive facts of the present case, involving the loss of a foreign vessel engaged exclusively in the domestic commerce of the United States, with charterparty made and charter hire payable in the United States, are not likely to provide fertile ground for future litigation.

IV. Respondents have no alternative forum.

The District Court, in granting Petitioner's Motion to Dismiss, had no occasion to address the issue of *forum non conveniens*. But the record makes painfully clear the total absence of any forum in Argentina or of any mutual agreement upon any other forum. Liberia's diplomatic efforts have been rebuffed by Petitioner. There are no known assets of Petitioner in Liberia, rendering meaningless any suit in this matter in the Liberian Courts even before the question of jurisdiction arises.

It is the position of *amicus* that when an attacking sovereign declines to open its courts, declines arbitration, and declines to entertain any suggestion of remedy for the neutral victims of its attack, then the victims are entitled to pursue their remedy in an effective forum. It is further the position of *amicus* that the District Courts of the United States offer the *only* forum capable of granting an effective remedy to the victims of the ultimately fatal armed attack upon the **HERCULES**, and that the United States District Court for the Southern District of New York, over a period of two centuries, has established an eminent ability in the application of maritime international law.

While it would be for the District Court on remand to consider the issue of *forum non conveniens* under the delegation of jurisdiction in 28 U.S.C. § 1333, together with the Alien Tort Statute and/or the F.S.I.A., this Honorable Court is already aware on the record before it that reinstatement of the District Court's decision would leave Respondents without recourse to justice in *any* forum. That, *amicus* submits, is an element of fundamental importance which it is proper for the Court to bear in mind on the disposition of this writ.

This is a case of admiralty and maritime jurisdiction, arising directly under Article III, § 2, Cl. 1 of the Constitution. It has been the hallmark of the admiralty jurisdiction as developed in the decisions of the Courts of the United States that it is applied in cases of uncertainty so as to avoid leaving the injured party with no forum. The principle has never been better stated than by Justice Paterson:

> The property was not restored to the libellants, nor were they compensated in damages; of course the decree in their favor remains unsatisfied. They had no remedy at common law; they had none in equity; the only forum competent to give redress is the district court of New Hampshire, because it has admiralty jurisdiction. There they applied, and, in my opinion, with great propriety.
>
> Judges may die, and courts be at an end; but justice still lives, and, though she may sleep for a while, will eventually awake and must be satisfied.

Penhallow v. Doane's Administrators, 3 U.S. (3 Dall.) 54, 93 (1795).

Conclusion

The Order of the Second Circuit should be affirmed; alternatively, the matter should be remanded to the District Court for trial on the merits with instructions to apply the maritime law of nations to the case.

Respectfully submitted,

FRANK L. WISWALL, JR.,
Counsel for The Republic of
Liberia as *amicus curiae*
11870-D Sunrise Valley Drive
Reston, Virginia 22091-3303
(703) 620-6780

Dated August 25, 1988